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NO. 80-1549

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

TEXPORTS STEVEDORE COMPANY, and TEXAS EMPLOYERS' INSURANCE ASSOCIATION, *Petitioners*

v.

MURL J. WINCHESTER and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, *Respondents*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF OF PETITIONERS

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Pursuant to Rule 22.5 of the Rules of the Supreme Court, Petitioners respectfully submit the following points in reply to the Brief for the Federal Respondent in Opposition.

The extreme difficulty posed by the majority opinion below is illustrated and emphasized by the distorted language to which the Federal Respondent is driven in its support of that opinion. For example, in successive sentences at page 12 of the Brief in Opposition, Respondents attempt to define the "essential *geographic* component of the situs requirement" according to whether it is " 'customarily used' for maritime purposes."[1] All mention of the statutory word "adjoining" is omitted, and an admittedly geographic concept is sought to be given a *functional* definition. The distortion inherent in giving a functional definition to a geographic requirement should not be overlooked. This approach is false both to the statutory language of Section 903(a), Title 33, U.S.C., which twice employs the word "adjoining", and to the Court's opinion in *Northeast Marine Terminals v. Caputo*, 432 U.S. 249, 278-280 (1977), which analyzes the situs question in geographic, "adjoining" terms.

This is the essence of the conflict with the Court of Appeals for the First Circuit, which in *Prolerized New England Co. v. Benefits Review Board*, 637 F.2d 30 (1st Cir. 1980), held that the situs test is *not* functionally determined, since function or customary maritime usage was absent from the precise location of the *Prolerized* claimant's injury, 637 F.2d at 38-39. Additionally, the First Circuit position is that:

> "The situs requirement is not satisfied merely because the injury occurred 'near' a covered area." 637 F.2d at 38. Pet. App. p. H-1.

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1. Emphasis supplied.

On the other hand, the Fifth Circuit majority opinion below, as supported by the Brief for the Federal Respondent in Opposition at p. 8, states as follows:

> "Although 'adjoin' can be defined as 'contiguous to' or 'to border upon', it can also be defined as 'to be close to' or 'to be near'. * * * So long as the site is close to or in the vicinity of navigable waters, or in a neighboring area, an employee's injury can come within the LHWCA. * * *". 632 F.2d at 514, Pet. App. p. A-20.

This is a conflict both of judicial language and articulated standards between the First and Fifth Circuits, a conflict which reflects a fundamentally different approach to the situs requirement, and which calls for resolution by Writ of Certiorari to the Court of Appeals for the Fifth Circuit in this case.

Finally, the government's suggestion that the situs definition problem is trivial and confined to this specific instance is belied first by the sentence immediately preceding that assertion in the Brief in Opposition, at page 7. Compare the last sentence of the factual section, quoted from the opinion below to the effect that in Houston, "the gearrooms of most stevedores were not on the docks proper," with the first Argument sentence which refers to a "relatively unusual factual situation." An additional and well documented example of cargo work away from the docks is illustrated in the Court's opinion in *National Labor Relations Board v. International Longshoremen's Association,* No. 79-1082, ____ U.S. ____, 48 L.W. 4765 (June 20, 1980). In that case a so-called "fifty-mile" rule for oceangoing container loading was discussed, and the factual pattern therein described illustrates the im-

portance of a workable situs definition for Longshoremen's Act jurisdiction. Congress used the word "adjoining" to limit[2] the shoreward expansion of federal coverage, but the majority below has read that limit right out of the statute. *See* dissent below, Pet. App. pp. A30-31.

CONCLUSION

In view of the conflict of the decision below with the prior decisions of the Court and with the contemporaneous decision of the Court of Appeals for the First Circuit, in light of the considerations urged by the eight dissenting judges below, and particularly in order to resolve authoritatively the situs to which the Longshoremen's Act Amendments of 1972 extended federal jurisdiction ashore, Petitioners respectfully pray that the Court grant a writ of certiorari and reverse the decision of the court below.

Respectfully submitted,

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2. *P. C. Pfeiffer Co., Inc. v. Ford*, 444 U.S. 69, 78 (1979): "Since § 3(a) already limits the geographic coverage of the Act, * * * *"